



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
ANDREW J. KOSSACK

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

August 6, 2010

Heather Neal  
Deputy Chief of Staff  
Indiana Department of Education  
151 West Ohio Street  
Indianapolis, IN 46204

*Re: Informal Inquiry 10-INF-32: Applicability of the APRA and the ODL to the Indiana High School Athletic Association's Case Review Panel*

Dear Ms. Neal:

This is in response to your informal inquiry regarding the Indiana High School Athletic Association's ("IHSAA") Case Review Panel ("Panel"). Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.* and Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.*

Your inquiry seeks my opinion regarding the Indiana Department of Education's ("IDOE") view that the Panel is not subject to either the APRA or the ODL because it is not a "public agency" within the meaning of either statute.<sup>1</sup> The Panel was established and is funded by the IHSAA, which is a non-public entity. The IHSAA does not fit any definition of a "public agency" provided in I.C. § 5-14-1.5-2 or I.C. § 5-14-3-2, so the IHSAA is not subject to either the ODL or the APRA. You include several arguments to support IDOE's position.

First, you note that the Indiana General Assembly delegated the establishment of the Panel to a non-government association (the IHSAA) through statute. I.C. § 20-26-14-6. You also cite to the Indiana Supreme Court's decision in *Indiana High School Athletic Association, Inc. v. Carlberg*, 694 N.E. 2d 222, 229 (Ind. 1997). In that opinion, the court acknowledged that decisions of the IHSAA "with respect to student-athletes constitute 'state action' for the purposes of federal and state constitutional review." But

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<sup>1</sup> Notwithstanding my opinion regarding the IDOE's arguments regarding the Panel, you note that the IDOE has routinely and will continue to post on the IDOE website information concerning cases that come before the Panel. However, because those cases involve student records, IDOE must and will redact any personally identifiable student information from such records to comply with the Family Education Rights and Privacy Act of 1974 ("FERPA"), 30 U.S.C. 1232, and subsection 4(a)(3) of the APRA.

while the Court made an analogy between the IHSAA and a government agency for the purposes of determining when judicial review is appropriate, it also maintained that the IHSAA is *not* a government agency and, therefore, is not required to “conform its procedures to those mandated by the Indiana Administrative Orders and Procedures Act (“AOPA”), IC § 4-21.5-1-1, or other statutes.” *Carlberg*, 694 N.E.2d at 231. The IDOE interprets the court’s opinion to include the APRA and ODL as “other statutes” to which the IHSAA is not required to conform.

Second, you state that the IHSAA is a “voluntary, not-for-profit organization that is self-supporting without the use of tax monies.” IHSAA WEBSITE, [www.ihsaa.org](http://www.ihsaa.org) (About IHSAA; Current Info; History). In order for a non-governmental entity to be deemed a “public agency” for the purposes of the APRA or ODL, it must be subject to budget review by the department of local government finance or the “governing body of a county, city, town, township, or school corporation” or be subject to “audit by the state board of accounts.” I.C. §§ 5-14-1.5-2(a)(3), 5-14-3-2(1)(3). The State Board of Accounts is permitted by statute to “examine all accounts and all financial affairs of every public...entity.” I.C. § 5-11-1-9. To be considered a “public entity,” a non-governmental body must be a “provider of goods, services, or other benefits that is: (1) maintained in whole or in part at public expense; or (2) supported in whole or in part by appropriations or public funds or by taxation.” I.C. § 5-11-1-16(e). See also, *Indianapolis Convention & Visitors Ass’n, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991). Since IHSAA does not fit the definition in I.C. § 5-11-1-16(e), it is not a “public entity” subject to State Board of Accounts audit and is therefore not a “public agency” for the purposes of the APRA or ODL.

Finally, you point out that in I.C. § 20-26-14-6, the General Assembly simply set out requirements the IHSAA must follow in establishing the Panel. The State Superintendent of Public Instruction administers the functions of the Panel, but those functions are performed under the auspices of the IHSAA. Because the Panel functions under the IHSAA, a private membership organization which is not subject to the AOPA or other statutes governing government agencies, it too is exempt from the ODL and the APRA. In the by-laws of the IHSAA, the rule that established the Panel provides that, in addition to meeting the necessary requirements set forth in statute, the Panel is “bound by the procedural rules and the substantive rules of the Association when reviewing any final decision of the Association.” IHSAA Rule 17-10.1. In addition, the Panel is funded solely by the IHSAA, meaning it is funded through non-public funds. IHSAA Rule 17-10.3(d).

Based on the information you provided, I agree that the Panel is not subject to the public access laws because it does not fit within the definitions of “public agency” in either the ODL or the APRA. See I.C. §§ 5-14-1.5-2; 5-14-3-2.1. The General Assembly did not create the Panel directly; it merely prescribes regulations concerning the Panel in I.C. § 20-26-14-6. The fact that state law regulates an entity and defines the legal limits of it does not trigger the applicability of the APRA or ODL. If it did, every private company formed under Title 23 of the Indiana Code would also be subject to the APRA and ODL because Title 23 includes elaborate regulations applicable to privately-held

business corporations. Such a result was not intended by the General Assembly. *See* I.C. § 5-14-1.5-1 (“It is the intent of this chapter that the official action of **public agencies** be conducted and taken openly....”) (emphasis added); I.C. § 5-14-3-1 (“[I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of **government** and the official acts of those who represent them as **public officials and employees.**”) (emphasis added).

Moreover, the provisions that apply to the Panel apply to any entity that is “an organization that conducts, organizes, sanctions, or sponsors interscholastic high school athletic events as the organization’s primary purpose.” I.C. § 20-26-14-1. Such an organization “must establish a case review panel” that meets certain requirements. I.C. § 20-26-14-6. Merely delegating the formation of a panel to a non-public entity and prescribing requirements to that entity regarding the panel is significantly different than the language that the General Assembly typically uses to create a public agency subject to the APRA and ODL. *See, e.g.*, I.C. § 21-18-2-1 (Commission for Higher Education for the State of Indiana: “A commission **is established** as an instrumentality and an agency of the state.”); I.C. § 21-11-2-1 (State Student Assistance Commission: “A state student assistance commission **is established.**”); I.C. § 25-26-13-3 (Board of Pharmacy: “The Indiana board of pharmacy **is created.**”); I.C. § 22-9-1-4 (Indiana Civil Rights Commission: “**There is hereby created** a civil rights commission.”); I.C. 8-1-1-2 (Indiana Utility Regulatory Commission: “**There is created** the Indiana utility regulatory commission.”) (emphasis added). Consequently, it is my opinion that in delegating the formation of the Panel to the IHSAA, the General Assembly did not intend to create a “public agency” subject to the requirements of the APRA and the ODL.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack  
Public Access Counselor